NO. 88-92 (3)



In The

# Supreme Court of the United States

OCTOBER TERM, 1987

FIKRY KHALIL,

*Petitioner,*

*-vs-*

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, - NEW JERSEY MEDICAL SCHOOL,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## BRIEF AND APPENDIX IN OPPOSTION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CARY EDWARDS
ATTORNEY GENERAL OF
NEW JERSEY
Hughes Justice Complex, CN 112
Trenton, New Jersey 08625
(201) 648-7579

Attorney for Respondent,
University of Medicine and
Dentistry of New Jersey -
New Jersey Medical School

ANDREA M. SILKOWITZ
Assistant Attorney General
*Of Counsel and Counsel of Record*

KATHERINE L. SUGA
Deputy Attorney General
*On the Brief*

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
655-1122

TABLE OF CONTENTS

## APPENDIX

## TABLE OF AUTHORITIES

### CASES CITED



### STATUTE CITED

No. 88-92

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SUPREME COURT of the UNITED STATES
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## COUNTERSTATEMENT OF THE CASE

In August 1971, petitioner Fikry Khalil began his employment with respond-

ent University of Medicine and Dentistry of New Jersey - New Jersey Medical School (hereinafter "University" or "UMDNJ" and "NJMS") as a post doctoral fellow (PaA3).* He held that position until 1974 when he became an Instructor of Radiology (PaA3). In 1975, petitioner took a two year unpaid leave of absence and taught in Saudi Arabia (PaA3). Upon his return to UMDNJ-NJMS in 1977, petitioner assumed the position of Assistant Professor of Radiology, without tenure, under a four year contract (PaA3). Petitioner was subsequently reappointed as an Assistant Professor, without tenure, for one additional term of three years or until June 1984 (PaA3-4).

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* PaA refers to Appendix A of petitioner's appendix.

On March 4, 1983, pursuant to a provision in the University Bylaws, Art. V, Title B, § 3(e), which required that notification of non-renewal of petitioner's appointment be given by the Dean of New Jersey Medical School or his designee twelve months prior to the expiration of his three year term, Dr. Vincent Lanzoni, Dean of the New Jersey Medical School, inquired of Dr. Gilbert Melnick, Chairman of the Department of Radiology, what action was recommended for petitioner (PaA4). On June 3, 1983, Dr. Melnick advised Dean Lanzoni and petitioner that neither he nor the tenured members of the department recommended petitioner for promotion to Associate Professor with tenure (PaA4). On June 22, 1983, Dr. Lanzoni officially notified petitioner that his employment

as an Assistant Professor at the University would terminate on June 30, 1984 (PaA4-5).

In January 1984, petitioner submitted himself to the Faculty Committee on Appointments and Promotions (hereinafter "FCAP") for consideration for promotion to the rank of Associate Professor with tenure (PaA5). This submission was without the support of Dr. Melnick (PaA5). On March 22, 1984, petitioner was informed that FCAP did not recommend him for promotion to the tenured rank of Associate Professor (PaA5). Petitioner appealed this decision on April 2 and on April 17, 1984, FCAP affirmed its decision not to recommend petitioner for promotion (PaA5). Petitioner was subsequently advised that the termination of his appointment as

Assistant Professor, effective June 30, 1984, had been approved by the Board of Trustees (PaA5).

On June 26, 1984, petitioner was proposed by his Department Chairman for a title change to Adjunct Assistant Professor for a one year term (PaA5). The Board of Trustees approved the change in title and petitioner accepted this position (PaA5-6). He was subsequently reappointed to the position (PaA5-6). On March 31, 1988, this appointment expired.

On January 4, 1985, petitioner filed a complaint with the Equal Employment Opportunity Commission alleging that the refusal to promote him from Assistant Professor to Associate Professor was because of his national origin (PaA6). Petitioner is Egyptian (PaA6).

On January 8, 1985, by way of a letter to Dr. Melnick, petitioner submitted his credentials for consideration for promotion from Adjunct Assistant Professor to Associate Professor, requesting that Dr. Melnick transmit same to Dean Lanzoni (PaA7). On January 9, 1985, Dr. Melnick transmitted petitioner's promotion papers to the Dean (PaA7). Dr. Melnick did not recommend petitioner for promotion (PaA7).

On January 23, 1985, Dean Lanzoni advised Dr. Melnick and petitioner that petitioner was not eligible for consideration for promotion (PaA7). As an Adjunct, petitioner could not submit himself to FCAP for consideration without the recommendation of his department chairperson (PaA8-9; PaA24-25).

On February 21, 1985, pursuant to the collective bargaining agreement between the University and the Council of Chapters of the American Association of University Professors, petitioner grieved Dean Lanzoni's refusal to transmit his application to FCAP (PaA8).

On August 28, 1985, an arbitration was conducted, at which time a former Chairman of FCAP, Dr. Sheldon Gertner, was called by petitioner (PaA8). He testified that he was aware of three faculty members who had been promoted from the rank of Adjunct Assistant Professor to Associate Professor; however, at the time of their promotions, all three individuals had the support and recommendation of their departmental chairpersons (PaA8-9). Petitioner, in contrast, did

not have the support of Dr. Melnick, his departmental chairman (PaA7-8).

On October 21, 1985, an Opinion and Award was rendered wherein the Arbitrator ruled that the Dean's refusal to transmit petitioner's papers to FCAP in 1985 did not violate applicable written University promotion procedures (PaA9).

On March 25, 1986, petitioner filed a Title VII action in the Federal District Court for the District of New Jersey (PaA9). Subsequently, on December 5, 1986, with leave granted, petitioner amended his complaint to assert claims under the Fourteenth Amendment and 42 U.S.C. § 1983 (PaA1-2).

On January 16, 1987, the University moved for summary judgment and/or dismissal of the 42 U.S.C. § 1983 claims, urging that petitioner had not demon-

strated the deprivation of any rights protected by the Fourteenth Amendment. On March 2, 1987, petitioner, through counsel, opposed the motion. On April 13, 1987, the Honorable Dickinson R. Debevoise, U.S.D.J., granted respondent's motion, agreeing that petitioner had failed to establish deprivations of any constitutionally protected property or liberty interests (PaA1-28).

With respect to petitioner's Title VII claim, respondent had previously sought summary judgment and/or dismissal grounded on the statute of limitations and its articulation of legitimate, non-discriminatory, non-pretextual business reasons. Petitioner's counsel opposed the motion and on May 26, 1987, the District Court found the entire Title

VII action to be untimely and granted respondent's motion (PaB1-14).*

Petitioner appealed from both orders. In connection therewith, petitioner submitted numerous documents which he never presented to the District Court (Pb6-7).** On February 2, 1988, respondent's motion to suppress portions of the appendix was granted and the judgment of the District Court was affirmed by Judgment Order and without opinion (PaC1-2).*** Petitioner's petition for rehearing was denied on February 26, 1988

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* PaB refers to Appendix B of petitioner's appendix.

** Pb refers to petitioner's petition.

*** PaC refers to Appendix C of petitioner's appendix.

(PaD1-2).*

On May 19, 1988, the petitioner sought relief from judgment before the District Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, based upon additional documents including those which were suppressed by the Court of Appeals (Ra3-4).** On May 26, 1988, petitioner filed a petition for writ of certiorari to the United States Supreme Court and on or about July 14, 1988, filed the instant appendix.

On June 28, 1988, the District Court denied petitioner's Rule 60(b) motion (Ra23-24) and entered an Order on July 21, 1988 (Ra25-26). With respect to

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* PaD refers to Appendix D of petitioner's appendix.

** Ra refer to respondent's appendix.

petitioner's attack on the disposition of his § 1983 claim, the motion was untimely, having not been brought within one year of entry of judgment (Ra6). As to the Title VII action, the Court concluded that none of the newly submitted documents undermined its dismissal based on the statute of limitations nor provided support for any of petitioner's allegations of national origin discrimination (Ra13; Ra15).

## SUMMARY OF ARGUMENT

The writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the United States Court of Appeals for the Third Circuit is erroneous or conflicts with any holdings of this Court or any other circuit court of appeals. Rather, the judgment order of the Third Circuit properly affirmed the District Court's application of Board of Regents v. Roth, 408 U.S. 564 (1972) in its dismissal of petitioner's claim of a property interest in tenure, consideration for tenure or in an extended probationary period as Assistant Professor. Similarly, the affirmance of the District Court's analysis concerning the commencement of the Title VII statute of limitations was proper and consistent with the holding

of this Court in Delaware State College v. Ricks, 449 U.S. 250 (1980). For these reasons, no bases exist for granting review of the writ of certiorari.

## ARGUMENT

### POINT I

THE WRIT SHOULD BE DENIED BECAUSE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT THAT PETITIONER HAD FAILED TO ESTABLISH A PROPERTY INTEREST FULLY COMPORTED WITH THIS COURT'S DECISION IN BOARD OF REGENTS v. ROTH, 408 U.S. 564 (1972).

In determining whether an alleged deprivation of a property interest constitutes a denial of due process, this Court has set forth a two pronged inquiry. First, it must be determined whether a property interest exists and second, what procedural protections inure thereto. Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972). The property interest in a benefit which is protected by procedural due process is "more than a unilateral expectation...." Id. at

577. Rather, it is "a legitimate claim of entitlement" created and secured by state law, rule or understanding. Ibid. Application of this analysis to the instant facts demonstrates that the District and Circuit Courts correctly concluded that petitioner had not established a property interest in tenure, consideration for tenure or an extension of his probationary period. Consequently, no bases exist in this regard for the granting of the writ.

The University of Medicine and Dentistry of New Jersey is governed by its Bylaws which provide that an Assistant Professor may be appointed for an initial term of four years and then may be reappointed for one additional term of three years. Art. V, Title B, § 1 (PaA12). If an Assistant Professor is promoted

from within to the rank of Associate Professor, tenure is conferred upon promotion. Art. V, Title B, § 1 (PaA12). Guiding the achievement of promotion and tenure at New Jersey Medical School, which is one of several educational units comprising the University, is a written system embodied in the Guidelines and Procedures for Appointment or Promotion to the UMDNJ-NJMS faculty. However, the authority to confer tenure and to promote to the rank of Assistant Professor or above lies solely with the Board of Trustees. Art. V, Title F, § 4.1 (PaA12).

In the case at bar, petitioner was appointed in 1977 to the rank of Assistant Professor, without tenure, for an initial term of four years. He was subsequently reappointed for one additional

term of three years as allowed by the University Bylaw, or until June 30, 1984. On June 22, 1983, the Dean of NJMS officially notified petitioner that his employment at the University would terminate on June 30, 1984. The Dean's letter of notification was in complete accordance with the University Bylaw as it provided written notice of non-renewal "twelve months prior to the expiration of an appointment longer than two years...." Art. V, Title B, § 3.

As in Board of Regents v. Roth, supra, there is no New Jersey statute which secures for petitioner a property interest in tenure, nor is a legitimate claim of entitlement created by any University or NJMS Bylaw. Petitioner's letter of reappointment to his second term as an Assistant Professor specifi-

cally provided that his employment as such would terminate on June 30, 1984 (PaA4; Da119)* and cannot be construed as securing the requisite legitimate claim of entitlement to tenure. Thus, petitioner's assertion of a property interest reflects nothing more than an "abstract need or desire" and as the District Court concluded, does not amount to a constitutionally protected interest (PaA22-23). The affirmance by the Circuit Court was correct and requires no review by this Court.**

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* Da refers to the supplemental appendix filed by the University with the Circuit Court.

** In his petition, petitioner relies on several documents which were suppressed by the Circuit Court since they were outside the record: the purported draft of the chairman's letter, purported

(Footnote Continued On Following Page)

As additional support for his § 1983 claim, petitioner urges that he should have been moved to an adjunct title for the six month period between December 1983 and June 1984 when he claims he was totally disabled and then returned to the Assistant Professor position for six months. Petitioner claims that this property interest in an additional six months as Assistant Professor is secured by a February 14, 1986 memorandum of Norma Davenport, Esq., Associate Vice-President (PaA14-15). However, the

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(Footnote Continued From Previous Page)

notes and the purported final draft of the chairman's letter. There is simply no basis for reviewing or disturbing that ruling. Moreover, petitioner's Motion for Relief from Judgment as to his § 1983 claims based on these same documents was denied by the District Court on July 21, 1988 as untimely (Ra6; Ra25-26).

unrebutted evidence presented by respondent to the District Court through affidavit established that moving a faculty member voluntarily from a tenure track position during the probationary period to a non-tenure track position is not mandated by the Bylaws of either UMDNJ or NJMS. While it is permitted, it is not routinely done. The Davenport memo merely reflected the permissive, rather than mandatory, nature of a move from tenure track to non-tenure track. Thus, there is no established rule or policy creating a property interest for petitioner in being moved from Assistant Professor to adjunct status and then back again, thereby extending his seven year probationary period. Therefore, affirmance by the Circuit Court of the District

Court's dismissal of this portion of petitioner's claim was proper.

Finally, petitioner contends that, in 1985, the Dean of NJMS violated his due process rights when he refused to transmit petitioner's credentials, while an Adjunct Assistant Professor, to the Faculty Committee on Appointments and Promotions for consideration for promotion to Associate Professor with tenure. Pursuant to the written hierarchical tenure system of the Guidelines, it is the responsibility of the department chairperson to recommend promotions, inter alia, in formal consultation with the tenured faculty of the department, to the Dean. Art. II, Title C, § 4.2 (Da62); Guidelines Art. II, Title A (Da112). The recommendation is then transmitted from the Dean to FCAP,

Faculty Council, the President and the Board of Trustees. Guidelines, Art. II, Title B (13) (Dal14). Included within the Guidelines is a self-submission provision which is designed to eliminate any unfairness at the departmental level which may prevent a faculty member from being recommended for promotion. The provision allows for the submission of one's own credentials to the Dean for transmission to FCAP. Guidelines, Art. II, Title G (Dal16). However, on its face, the provision is applicable only to Instructors, Assistant Professors or Associate Professors, all of which are positions of full academic rank. Art. V, Title F, § 1 (PaA23-24). Adjunct Assistant Professor, on the other hand, is a position of qualified rank, Art V, Title F, § 1.2, and not a position encom-

passed by the self-submission proviso (PaA24). Although the Dean has, in some instances, transmitted adjuncts' credentials to the FCAP, it is because they all had departmental recommendation (PaA24-25). Petitioner, in contrast, did not have such support (PaA7). Therefore, there is nothing in the Bylaws or Guidelines which required the Dean to submit petitioner's credentials, while an adjunct, to FCAP. Nor has petitioner established the existence of a policy whereby an adjunct, lacking departmental support, can self-submit himself to FCAP for review. Consequently, petitioner has failed to demonstrate a claim of entitlement to FCAP consideration for promotion from adjunct to Associate Professor with tenure.

Therefore, the Circuit Court's affirmance of the dismissal of petitioner's § 1983 claims was clearly a correct interpretation of the governing law as enunciated by this Court.

## POINT II

### NO JUSTIFICATION EXISTS FOR REVIEWING THE AFFIRMANCE BY THE CIRCUIT COURT OF THE DISMISSAL OF PETITIONER'S TITLE VII ACTION.

In bringing his Title VII action, petitioner alleged a discriminatory refusal to promote to Associate Professor with tenure because of his national origin. Since petitioner failed to file a timely charge with the Equal Employment Opportunity Commission, the Circuit Court was correct in affirming the District Court's dismissal under the rule announced in Delaware State College v. Ricks, 449 U.S. 250 (1980).

As noted earlier, in 1981, petitioner received a second term appointment for three years as an Assistant Professor, which appointment was to expire on June 30, 1984. Pursuant to the 12

month notice of non-renewal Bylaw which vested the Dean with the authority to communicate such decisions to the appointee, Dean Lanzoni notified petitioner on June 22, 1983 that his employment as an Assistant Professor would end on June 30, 1984. Petitioner did not file a charge with the EEOC until January 4, 1985.

In New Jersey an aggrieved individual has 300 days from the date of the discriminatory act to file with the EEOC. Mohasco Corp. v. Silver, 447 U.S. 807, 817 (1982); Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 751 (3d Cir. 1983), cert. den. 464 U.S. 852 (1983). Under this Court's pronouncement in Delaware State College v. Ricks, supra, the calculation of the limitations period commences at the time the tenure

decision is made and communicated to the affected individual, even though one of the effects of the denial of tenure -- the loss of a teaching position -- does not occur until later. This Court thus rejected the argument that the Delaware State College Board's decision to deny tenure did not become final until the Board denied Ricks' grievance, since the Board had made clear to Ricks far before disposition of his grievance that it had formally and officially denied him tenure. "The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." Id. at 261.

These same principles were properly applied to the case at bar. The June 22, 1983 letter from the Dean to petitioner

"officially inform[ed]" him, in accordance with the Bylaws, that his appointment as Assistant Professor was not to be renewed and that his employment would terminate on June 30, 1984. Pursuant to the Bylaws, the final authority to advise of non-renewal reposes with the Dean (or his representative), Art. V, Title B, § 3, and the Bylaws do not require final approval by the Board on non-renewals of term appointments. Art. II, Title B, §§ 1 and 2; Art. II, Title C, §§ 2 and 4; Art. V, Title F, § 4.1; Art. VI, Title B, § 1; Art. VII, Title C, § 8; Art. V, Title B, § 3 (PaB10). Nevertheless, as established by unrebutted affidavit presented to the District Court, all personnel actions taken at NJMS are routinely submitted to the Personnel Committee of the Board for informational

purposes (Da156). As a matter of courtesy, by way of letter on June 22, 1984, the Board's Committee acknowledged the Dean's prior notice of non-renewal (Da156). Petitioner knew full well however, on June 22, 1983, that his appointment as an Assistant Professor would terminate on June 30, 1984 and under Ricks, the statute of limitations began to run from June 22, 1983. Petitioner's filing with the EEOC on January 4, 1985, 18 months later, was therefore untimely and his Title VII action was properly dismissed.

This conclusion, as the District Court and Court of Appeals found, is not altered by petitioner's implementation of the self-submission provision of the Guidelines. That particular clause allows an Assistant Professor, who cannot

secure the support of his departmental chairperson, to submit his credentials directly to FCAP, for review. However, as this Court noted in Ricks, "The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made." 449 U.S. at 261. The provision allowing for self-submission is clearly designed to prevent any unfairness at the departmental level from precluding a faculty member's consideration for recommendation for promotion by FCAP. Thus, it acts as a remedy for those faculty members who fail to secure a recommendation at the departmental level and, in the instant case, like Ricks, was "not an opportunity to influence [the

non-renewal] decision before it [was] made." 449 U.S. at 261. Therefore, petitioner's self-submission did not toll the statute of limitations with respect to his failure to be promoted to Associate Professor with tenure. These claims, consequently, were properly dismissed as untimely.

Assuming arguendo, however, that petitioner is correct in claiming that FCAP's rejection following his self-submission renders the EEOC filing timely, the University amply demonstrated, before the District Court, legitimate, non-discriminatory and non-pretextual reasons for its actions. Affirmance of summary judgment by the Circuit Court on those alternative grounds was warranted. Singleton v. Wulff, 428 U.S. 106, 121 (1976).

In response to petitioner's self-submission to FCAP, the Committee unanimously concluded that it could not recommend him for promotion to Associate Professor with tenure because he "ha[d] not presented evidence of the development of an independent, focused research program, evidence of stature in the national academic community, and ha[d] not obtained extramural grant funding ..." (Da9). Following petitioner's appeal under the Guidelines, FCAP unanimously affirmed its earlier decision (Da11).

In an attempt to establish pretext, petitioner pointed to the promotion of Marguerite Stout, Ph.D. As the University presented through affidavit, Dr. Stout was recommended for promotion by her department and chairperson. FCAP

declined to so recommend and rejected her appeal. One year later, again with the support of her department and chairperson, Dr. Stout was recommended for promotion. Again FCAP disagreed. Dr. Stout again appealed and FCAP reversed itself. Subsequently, the Board of Trustees promoted her (Da164-165).

Obviously petitioner differs from Dr. Stout in that he failed to receive the recommendation of his department and chairperson (PaA5). The mere fact that FCAP finally recommended Dr. Stout for promotion and did not recommend petitioner lends no support to the instant claim of discrimination and certainly

provides no justification for issuance of the writ.*

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* Although petitioner points to several new documents in connection with his Title VII claim (two purported drafts of letters by his chairperson and purported notes), these documents were properly suppressed by the Circuit Court. Petitioner's attempt to ground a motion for relief from judgment upon these same documents was unsuccessful before the District Court (Ra25-26).

Finally, petitioner appears to have abandoned his claim that the Dean's refusal to allow him to self-submit his credentials to FCAP for consideration for promotion to Associate Professor, while an adjunct, was discriminatory. In the event petitioner raises this issue in his reply, respondent wishes to note that the evidence presented to the District and Circuit Courts established that the Dean only transmitted the credentials of those adjuncts who had the support of their chairpersons to FCAP (PaA8-9; PaA24-25). Petitioner had failed to secure his chairperson's recommendation (PaA7). Thus, he was not similarly situated and did not establish differential treatment based on his national origin. Although not addressed by the District Court as a discrete cause of

(Footnote Continued On Following Page)

## CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent

By _____
Andrea M. Silkowitz
Assistant Attorney General
Counsel of Record

By _____
Katherine L. Suga
Deputy Attorney General

DATED: August 11, 1988

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(Footnote Continued From Previous Page)

action, affirmance of its dismissal by the Circuit Court was entirely proper under Singleton v. Wulff, supra.

# APPENDIX

APPENDIX A

Not for Publication

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|---|---|
| FIKRY L. KHALIL, Plaintiff, vs. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY - NEW JERSEY MEDICAL SCHOOL, Defendant. | UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY<br>Civil Action No. 86-1066<br>Opinion |

DEBEVOISE, District Judge:

This case has come before the court on a motion by plaintiff, Fikry Khalil, Ph.D., for relief from judgment pursuant to Fed. R. Civ. P. Rule 60(b). Defendant University of Medicine and Dentistry of New Jersey--New Jersey Medical School (hereafter "University" and "UMDNJ") objects that plaintiff's motion is time-barred with respect

to the judgment dismissing his due process and 42 U.S.C. sec. 1983 claims, and argues that the relief should not be granted with respect to the judgment dismissing the Title VII claim.

This case was originally brought as a Title VII action by plaintiff, who was employed as a professor of medicine by defendant. Plaintiff alleged that he had been discriminated against on account of his national origin, which is Egyptian. The action was dismissed for reasons set forth in a bench opinion of May 26, 1987, because plaintiff had not timely filed a charge with the Equal Employment Opportunity Commission.

Prior to that dismissal, plaintiff had been permitted to amend his complaint to allege an additional claim

under the due process clause of the Fourteenth Amendment and under 42 U.S.C. sec. 1983. In a bench opinion dated April 13, 1987, I granted the defendant's motion for summary judgment on plaintiff's constitutional claim. These determinations were affirmed on appeal, in an order dated January 19, 1988.

Basis for Motion

Several documents form the basis for this motion for relief from judgment: (1) a February 15, 1988 letter from plaintiff's former chairperson, Dr. Gilbert Melnick, which describes several of their conversations from early 1986; (2) a July 30, 1986 letter to plaintiff from Dr. Melnick; (3) a purported draft of a letter from Dr. Melnick to Dean Lanzoni; (4) two

undated, handwritten notes, author(s) unknown; and (5) a purported undated memo from Dean Lanzoni to an unknown recipient; (6) a memo from the Associate Vice President of the school describing the possibility for placing faculty members whose academic progress has been slowed by illness in adjunct positions to permit them to catch up; and (7) a newspaper article describing complaints of racial discrimination at UMDNJ.

Discussion

While ordinarily a district court may not change a judgment which has been affirmed on appeal, relief pursuant to Rule 60(b) may nonetheless be available under certain special circumstances. Rule 60(b) provides that:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Rule further sets forth time limits for bringing motions:

> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order,

or proceeding was entered or taken.

The basis which plaintiff invokes for relief from judgment is apparently either (1) or (2). He has offered new evidence, some of which he says could not have been discovered prior to judgment, and some of which he maintains was not presented to the court as a result of mistake or inadvertance on his or his attorney's part.

Sec. 1983 Claim

Since the order dismissing plaintiff's sec. 1983 and due process claims was dated April, 1987, the motion is untimely with respect to this claim. I am without power to extend the time for bringing this type of motion, and appeal does not toll the time for filing such a motion. Transit Casualty Co. v. Security Fund, 441 F.2d 788 (5th

Cir. 1971), cert. denied, 404 U.S. 864 (1971).

Even if plaintiff claims that his attorney's miscalculation brings him under Rule 60(b)(6), the "catch-all" provision, the motion cannot be considered now. On occasion lawsuits involve some attorney error; the extraordinary relief of Rule 60(b)(6) is not available where "a party makes a conscious informed choice of litigation strategy" but "his assessment of the consequences [proves] incorrect." Ackerman v. United States, 340 U.S. 193 (1950). Failure in the context of a motion for summary judgment to submit all facts known which might have been useful to the court is an inadequate basis for setting aside a judgment. See Wright & Miller,

Federal Practice & Procedure sec. 2858 (1973).

Moreover, such a motion must be made within a reasonable time. Plaintiff could have moved to amend judgment based on Dr. Melnick's positive view of his work immediately following dismissal of his claims. Permitting parties to offer new evidence over a year after decisions, when that evidence was available immediately after decision, would needlessly undermine the finality of judgments.

The other documents relevant to the sec. 1983 claim--a purported draft of a letter from Dr. Melnick to Dean Lanzoni and two handwritten notes--can only be characterized as new evidence, which must be submitted within one year of judgment. Thus, it is

too late to consider this evidence now.

Title VII Claim

The Rule 60(b) motion is timely with respect to the dismissal of plaintiff's Title VII claim alleging discrimination on account of national origin, since that claim was not dismissed until May 26, 1987, less than a year prior to the filing of the instant motion. However, a party seeking to reopen an action to introduce new evidence must do more than show that the new evidence is of potential significance. Plisco v. Union Railroad Co., 379 F.2d 15, 16 (3d Cir. 1967), cert. denied, 389 U.S. 1014 (1967). The burden for granting of a new trial, which is the same as that governing relief from judgment on the basis of

newly discovered evidence, United States Fidelity and Guaranty Co. v. Lawrenson, 334 F.2d 464, 465 (4th Cir. 1964), cert. denied, 379 U.S. 869 (1964), is that plaintiff must show that the new evidence would probably change the outcome of the court's prior determination. Giordano v. McCartney, 385 F.2d 154, 155 (3d Cir. 1967). See also Bradley Bank v. Hartford Acc. and Indem. Co., 737 F.2d 657 (7th Cir. 1984) (in action on insurance policy, trial court did not abuse its discretion in denying plaintiff's motion to vacate on the basis of allegedly newly discovered evidence since plaintiff could not demonstrate that the evidence would probably have produced a different result); Trans Mississippi Corp. v.

United States, 494 F.2d 770 (5th Cir. 1974) (motion of taxpayer for relief from judgment on ground of newly discovered evidence was properly overruled on the ground, among others, that the evidence was merely cumulative or impeaching and therefore not "newly discovered").

Here, most of the new evidence offered by plaintiff does not go to the issue which was the reason for the dismissal of that claim--namely, the fact that plaintiff failed to timely file a discrimination complaint with the EEOC. I concluded that based on Delaware State College v. Ricks, 449 U.S. 250 (1980), the date on which the statute of limitations began to run was June 22, 1983, when plaintiff received official notice that his

employment was to be terminated. This was the date on which the decision not to promote him to the tenured position of Assistant Professor was made and communicated to him. I held that:

> . . . the fact that plaintiff submitted his credentials for reconsideration does not serve to extend the limitations period. Although plaintiff seeks to phrase his complaint as alleging three separate discriminatory acts--his termination, the Faculty Committee's refusal in 1984 to recommend his promotion with tenure, and the Dean's refusal in 1985 to submit plaintiff's credentials for reconsideration--they are all part and parcel of the defendant's decision not to promote him.

Bench Opinion at 8. Since I found that the claim was time-barred, I did not reach the merits of the discrimination issue. This decision was affirmed on appeal. Plaintiff seeks to relitigate that issue now, but I have no power to change a legal decision which

was affirmed by the Third Circuit.

None of the documents newly presented by plaintiff substantially undermines my conclusion concerning the statute of limitations issue. Plaintiff was officially notified of the planned termination in June 1983. In connection with the summary judgment motion, plaintiff submitted many documents demonstrating that this decision was not absolutely final, in that subsequent efforts to obtain reconsideration were available to plaintiff, which he purused. It was at that date that the limitation period commenced, not at the time when all administrative remedies had proven futile. Plaintiff's argument that self-presentation was an alternate route to tenure was before the district court in the

original action; plaintiff's Exhibit I submitted with the reply brief in connection with this motion is merely cumulative.

Plaintiff criticizes his attorney's decision to present no evidence from Dr. Melnick before dismissal; the attorney had, according to plaintiff, planned to wait for the discovery period and to obtain an affidavit from Dr. Melnick attesting to his satisfaction with plaintiff's work. Plaintiff suggests that this decision may have been responsible for the dismissal of his case, and apparently seeks to characterize this failure as excusable inadvertence. However, it is clear that this decision was not responsible for the dismissal of the case. The case was dismissed for failure to file

an EEOC complaint within the applicable time limit. This evidence does not change my conclusion on that issue.

Even assuming that it would be possible to reach the merits of plaintiff's discrimination claim, the new evidence does not provide substantial support for plaintiff's allegation that he suffered discrimination because of national origin. Given the procedural context here, plaintiff's burden is higher than it was in the summary judgment motion. Plaintiff must not merely raise a genuine issue of material fact, but must show that but for the failure to offer certain materials, the result would probably have been different. While I did not reach the merits of the case in dealing with the earlier summary judgment motion,

because I concluded that the case was barred by the statute of limitations, I will examine those merits briefly now.

Plaintiff's essential argument that there is discrimination is that he believes he was as qualified as other persons who have been granted promotions to tenured positions. However, there was no evidence presented in this connection beyond his own insistence that he was as qualified as others for promotion and tenure. He did not have the support of the departmental chair for approval, a situation which distinguished his case from those of adjuncts who achieved tenured status. None of the tenured faculty in his department supported his promotion to tenured status, citing

facially legitimate reasons: lack of an independent, focussed research program, lack of a track record in obtaining grants, and lack of national prominence.

Plaintiff has responded to these claims; however, his responses are not so compelling as to make it likely that the result would be different if his claims were addressed on the merits. Plaintiff has not shown evidence of a national reputation or international prominence as a mature scholar; rather, he has shown that even before he obtained professor rank, he was invited to teach in Egypt and Saudi Arabia. He has shown one recent success in obtaining grants, not the kind of long-term record which would ensure an institution making a lifetime

commitment that funding could be counted on to come from elsewhere. As for the department's strong and unanimous reservations concerning his research, no court would presume to override those views in the absence of extremely strong evidence, which is lacking here, that these reservations are unfounded. Merely looking at the quantity of articles and at the fact that plaintiff's name appears first on many of them is insufficient to overcome defendant's proffered justifications, particularly in the absence of any evidence of discrimination on the basis of national origin.

Given these facially legitimate reasons, plaintiff faced a burden confronted with a summary judgment motion of providing evidence that these

motivations were in fact a pretext for a discriminatory hiring. Plaintiff has not met that burden. He has provided no outside testimonials to the quality of his work, and received no support for tenure from within the department. Even where there is considerable evidence of a scholar's excellent qualifications, courts are extremely cautious in interfering with academic personnel decisions. See, e.g., Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984) (for Title VII plaintiff to succeed in denial of tenure case, evidence must show more than denial of tenure in context of disagreement about merits of candidate's research and teaching or needs of department, and absent evidence supporting finding that such disagreements or doubts are

influenced by forbidden considerations, universities are free to establish departmental priorities, set their own required levels of academic potential and achievement, and act on the good-faith judgment of their departmental faculties or reviewing authorities).

Plaintiff has provided no evidence that Dean Lanzoni, Dr. Melnick, or any members of the Faculty Appointment and Promotion Committee which voted on his case were motivated by hostility towards Egyptians. In connection with the instant motion for relief from judgment, he has presented a newspaper article describing allegations of discrimination against blacks in hiring and promotion at the medical school. Apart from the fact that this is not

evidence in admissible form, it applies to a different type of discrimination, the presence of which has no necessary correlation with prejudice against persons of foreign ancestry or against Egyptians in particular.

The new evidence does not fill the vacuum left by plaintiff's failure to provide any evidence of unlawful discrimination. It provides evidence that Melnick was satisfied in late 1986 with plaintiff's work and with his success in obtaining outside funding, and expected to support him for tenure, but casts no light on the ultimate reasons for tenure denial. Plaintiff maintains that Exhibits C-F constitute evidence that this ultimate shift in the department's

evaluation of him was motivated by discriminatory animus. The handwritten notes by unknown sources are hard to evaluate, but they clearly do not create a situation in which it is probable that the outcome would have changed had they been introduced. The fact, if it is one, that Dr. Melnick modified his letter to reflect Dean Lanzoni's doubts concerning the originality of plaintiff's work does not suggest that discrimination was at work. At most, it suggests that Dr. Melnick chose to reconcile a divergence between his view of plaintiff's work and the Dean's view by adopting the latter.

Nor does the notation on Exh. F by someone that the memo from Dean Lanzoni should be kept "well-hidden" confirm the existence of illicit motiva-

tions. It is typical in personnel matters to insist upon confidentiality, and to conceal the source of negative assessments from the people affected. The desire to prevent a situation in which Dr. Lanzoni would appear responsible is not surprising, and does not constitute evidence of national origin discrimination.

Since the earlier introduction of this evidence would not have changed the outcome, it is unnecessary to consider whether there are special circumstances which excuse the failure to produce this evidence before the disposition of the earlier action.

Conclusion

For the reasons described, plaintiff's motion for relief from judgment is denied. Counsel for defendant is

directed to prepare an appropriate form of order.

DICKINSON R. DEBEVOISE, U.S.D.J.

June 28, 1988
DATE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | |
|---|---|
| FIKRY L. KHALIL,<br><br>Plaintiff,<br><br>v.<br><br>UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY - NEW JERSEY MEDICAL SCHOOL,<br><br>Defendant. | Hon. Dickinson R. Debevoise, U.S.D.J.<br><br>Civil Action No. 86-1066(DRD)<br><br>ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT |

This matter having been opened to the Court by Fikry Khalil, appearing pro se, seeking an Order granting relief from judgment, and Cary Edwards, Attorney General of New Jersey, by Katherine L. Suga, Deputy Attorney General, appearing for defendant, and the Court having considered the Briefs, Appendices and Affidavits submitted

in connection with the motion, together with oral argument; and for the reasons set forth in a written opinion;

IT IS, THEREFORE, this 21st day of July, 1988,

ORDERED that plaintiff's motion for relief from judgment is hereby denied.

DICKINSON R. DEBEVOISE, U.S.D.J.